

RESPUBLICA *versus* JOHN ROBERTS.

1778.

**I**NDICTMENT for *High Treason*.—A witness was called to prove, that the Defendant had attempted to prevail upon him to enlist with the *British* army; but that he did not succeed. This gave rise to a question on these words of the act of Assembly:—“That if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this State &c. by *persuading* others to enlist for that purpose &c. he shall be adjudged “guilty of high treason” 2 *State Laws* p. 18. 19.

In support of the prosecution, it was urged, that the attempt to prevail, constituted the crime; and that it was like the case of a man’s sending intelligence to the enemy, which was an act equally criminal in the sender, whether the intelligence was received, or not.

For the Defendant, it was argued, that *persuading* implies *success*;—*suadeo* signifying to advise, and *persuadeo* to advise through, or successfully: And, therefore, it cannot properly be said of any person, that he was *persuaded*, unless he has done some act in consequence of his persuasion.

BY THE COURT:—There is proof of an overt act, that the prisoner did *enlist*, and evidence is now offered to shew, that he also endeavoured to *persuade* others to enlist, in the armies of the enemy. But we are of opinion, that the word *persuading*, used by the Legislature, means to *succeed*; and that there must be an actual enlistment of the person *persuaded*, in order to bring the Defendant within the intention of the clause. 2 Lord Ray. 889.

The evidence offered, however, is proper to shew *quo animo*, the prisoner himself joined the *British* forces.

The counsel for the Commonwealth then offered to give in evidence, the confession of the Defendant, that he was going to the *Head of Elk*, in order to communicate some information to Mr. *Galloway*, who had at that time, gone over to the enemy.

But it was opposed by the adverse counsel, who contended, that a confession, unless in open Court, had never been evidence to convict. That, though under the 1 *Edward* 6. it is said a man might be convicted of treason, by the testimony of two witnesses, or his voluntary confession; 2 *Hawk.* 256. yet, that statute does not extend to *Pennsylvania*, and by the 7 *W.* 3. c. 3. it is expressly declared, that no man can be indicted, arraigned, or tried, in a case of treason, but by the testimony of two witnesses, or the confession of the party made, without violence, in open Court. *Fest.* 10. 241. 2. 3. But the act of Assembly of *Pennsylvania* totally excludes a conviction by confession. See *Prin. Pen. Law* 149. A confession may, indeed, be given in evidence to corroborate a treason that has already been established by two witnesses; but not to prove the treason itself.

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BY THE COURT :—To prove the Defendant's confession by two witnesses, is certainly not sufficient, under the statute, to convict him. But a confession after the fact, is proof of the *fact itself*; and though not competent alone to supply the want of two witnesses, yet it is good by way of corroboration: And, therefore, if an *overt act* has been proved in the county of *Chester* by two witnesses, the evidence now offered will be proper, in confirmation of their testimony.

One of the *overt acts*, then, laid in the indictment, is aiding and assisting the enemy by joining their armies, and this has been legally and satisfactorily proved. Notwithstanding, therefore, the other *overt act* of giving intelligence to the enemy, is not supported by any evidence, but the Defendant's own confession now offered, and which is in that respect insufficient; yet, it may be produced to substantiate another species of treason; and on that ground we now admit it to be proved. See *Foster* 10. 244. 5 *Bacon's Abr*, 145. *Gregg's Case*. 2 *Hawk.* 442.

The *Attorney General* and *Reed*, for the Commonwealth—*Ross* and *Wilson*, for the Defendant.

The prisoner being convicted by the Jury, his counsel moved the Court to set aside the verdict, and grant a new trial, because he was advised, "that the evidence given respecting his declarations, or confessions, was altogether illegal, and ought not to have been allowed."

After argument, by the same counsel, on both sides, the motion was refused BY THE COURT, who gave judgment for the Commonwealth; and the Defendant, a short time afterwards, was, accordingly, executed.